87-273

No. 87 .....

Supreme Court, U.S.
FILED
AUG 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ST. JOHN STEVEDORING CO., INC.
and
INSURANCE COMPANY OF NORTH AMERICA,
Petitioners,

v.

JOHNETTA WILFRED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KING WATERS
COOK, DAVIS & MCFALL
Two Houston Center
909 Fannin, Suite 2600
Houston, Texas 77010-1003
Telephone: 713-757-0440
Attorneys for Petitioners

45pp

QUESTIONS PRESENTED

Under the Longshore and Harbor Workers' Compensation Act:

I. After a longshore worker settles his third-party injury action without approval of the stevedore, are the worker's dependents entitled to compensation upon his death?

II. When evidence of an illegitimate child's paternity and dependency is in controversy:

A. May the Benefits Review Board simply substitute its opinion for that of the Administrative Law Judge, whose findings on paternity were supported by substantial evidence in the record considered as a whole?

B. May the Benefits Review Board deem the evidence of dependency conclusive as a matter of law even though the Administrative Law Judge never reached the issue of dependency?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

JOHNETTA WILFRED

ALENE C. JONES

ST. JOHN STEVEDORING CO., INC.

INSURANCE COMPANY OF NORTH AMERICA

SOLICITOR OF LABOR
UNITED STATES DEPARTMENT OF LABOR

DIRECTOR
OFFICE OF WORKERS' COMPENSATION
UNITED STATES DEPARTMENT OF LABOR

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on June 3, 1987, rehearing en banc denied on July 1, 1987, in a claim for death benefits under the Longshore and Harbor Workers' Compensation Act.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 818 F.2d 397 (5th Cir. 1987) (Appendix A). The opinion of the Benefits Review Board is reported at 18 B.R.B.S. 68 (1986) (Appendix B). The opinion of the Administrative Law Judge is reported at 17 B.R.B.S. 109 (ALJ) (1985) (Appendix C).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 3, 1987. A timely petition for rehearing en banc was denied on July 1, 1987. This petition for certiorari is filed within sixty days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Title 33 U.S.C. § 902(12):

> (12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

Title 33 U.S.C. § 909:

> If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit . . .

Title 33 U.S.C. § 909(f):

> All questions of dependency shall be determined as of the time of the injury.

Title 33 U.S.C. § 921(b)(3):

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party-in-interest from decisions with respect to claims of employees under this Chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole . . .

Title 33 U.S.C. § 933(a):

> (a) If on account of a disability or death for which compensation is payable under this chapter the person enti-

tled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

Title 33 U.S.C. § 933(e)(1)(D):

> Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (i) The employer shall retain an amount equal to — (D) the present value of all amounts thereafter payable as compensation. . .

Title 33 U.S.C. § 933(g):

> (g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Following an injury of May 27, 1979, longshoreman John Henry Jones received benefits under the Longshore and Harbor Workers' Compensation Act (Act). Thereafter, he filed a third-party action for personal injury damages in Texas state court. This suit settled in December 1981 for a present cash value of more than $1 million. Employer, St. John Stevedoring Co., Inc.

(St. John) and carrier Insurance Company of North America (INA) received certain monies under this settlement, but never formally consented per Section 33 of the Act.

After John Henry Jones died June 8, 1982, Johnetta Wilfred claimed for death benefits as an illegitimate child. This claim was heard by Administrative Law Judge Walley in November 1983, who held that the child failed to prove paternity. He made no findings as to dependency.

The child appealed to the Benefits Review Board which held that the child should receive benefits despite the third-party settlement.

St. John and INA petitioned for review of the Board's Decision by the United States Court of Appeals for the Fifth Circuit, which affirmed.

B. Statement of the Facts

Longshoreman John Henry Jones was permanently and totally disabled as a result of an injury suffered in the Port of Galveston, Texas May 27, 1979 while working for St. John. He filed a personal injury lawsuit in Texas state court against various third-party defendants. This action settled in December 1981 for a present cash value of more than $1 million.

St. John and INA were reimbursed under the release agreement for benefits paid. They did not file a written approval of the third-party settlement on Form LS-33 in the office of the deputy commissioner within thirty days after the compromise was made.

During his third-party claim, John Henry Jones testified at deposition that he had an illegitimate daughter, Johnetta Wilfred. Although she was referenced in John Henry Jones' will, she did not receive a direct bequest. After his death, she claimed death benefits under the Act.

John Henry Jones made $200 a week as a longshoreman. From this amount, he supported himself in Galveston, the city where he was injured. He also supported his mother, Alene Jones, who lived in Brenham.

REASONS FOR GRANTING THE WRIT

I.

Third-Party Settlements Offset All Future Longshore Compensation, Even Death Benefits.

The Act entitles an employer to deduct from a third-party recovery "the present value of all amounts thereafter payable as compensation . . ." 33 U.S.C. § 933(e)(1)(D); see also *Bloomer* v. *Liberty Mutual Insurance Company*, 445 U.S. 74, 78-79 (1980).

"Compensation" includes the money allowance payable to an employee "or to his dependents" and includes "funeral benefits." 33 U.S.C. § 902(12).

It is therefore clear that Section 33 of the Act allows an employer to offset future death benefits against the proceeds of a decedent's third-party recovery.

II.

A Dependent Becomes "Entitled" To Benefits Under The Act, Even Though Compensation Is Not Yet Payable.

The opinions below hold that Section 33 offsets do not accrue until a dependent is actually receiving compensation *and* also settles with a third party. This reading of the Act is clearly mistaken.

"Entitlement" to compensation arises at the time of injury, which determines who is dependent upon the worker. Once a worker becomes totally disabled due to a compensable injury,

death benefits automatically accrue to his dependents. See 33 U.S.C. § 909 (preamble paragraph). The Act does not require that third-party actions be settled by persons actually *receiving* compensation before offset matures.

III.

Once A Third-Party Settlement Prejudices An Employer's Future Subrogation Rights, The Right Of Offset As To Payment Of Future Benefits Obtains.

John Henry Jones settled his third-party claim, not only for himself, but also for his "next of kin." The causes of action covered in the release included "loss of services," an item of damages peculiarly reserved to dependents under the general maritime law. *Sea-Land Services* v. *Gaudet*, 414 U.S. 573, 584-85 (1974). The third parties are now free to plead collateral estoppel as to those amounts paid and those items mentioned in the release. *Id.* at 592-95. Therefore, the child should have an equitable right to participation in the settlement.

Further, since the child's third-party claim has been prejudiced to the extent of collateral estoppel, the subrogation rights of the employer have also been prejudiced. Such prejudice either estops the death benefits claim of the child, or offsets the benefits payable. See *Chapman* v. *Hoage*, 296 U.S. 526, 532 (1936).

In any other construction, the compensation lien could never be ascertained in a judgment or settlement, since the potential recovery for death benefits would always loom. Therefore, no third-party case could ever be effectively settled as between the employer and the claimant, since the employer could never be assured that the third-party claim resolved all potential outcomes from the injury or death.

The following will obtain under the Fifth Circuit's decision:

> A father settles his claim for personal injury/wrongful death with third parties, recovering substantially. By will, he specifically devises those assets so as to deny his children. Despite the significant third-party recovery, the child resorts to longshore death benefits, available until the age of 25.

Such a result takes the Act beyond a *compensation scheme* and makes it a form of life insurance. This was neither the intent of the Act, nor has it been the judicial construction of the Act. *U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, O.W.C.P.*, 455 U.S. 608, 615 n.10 (1982). *See also Standard Dredging Corporation* v. *Henderson*, 150 F.2d 78, 81 (5th Cir. 1945).

Dicta in *International Mercantile Marine Co.* v. *Lowe*, 93 F.2d 663 (2d Cir. 1938), cert. den., 304 U.S. 565 (1938), states that a new cause of action for death benefits arises upon death of the longshoreman. This case deals, however, not with a third-party settlement of a potential wrongful death claim, but with a widow's right to claim for benefits over and above pre-death weekly benefits paid the injured worker. *See also Hitt* v. *Cardillo*, 131 F.2d 233 (D.C. Cir. 1942), cert. den., 318 U.S. 770 (1943); *Hampton Roads Stevedoring Co.* v. *O'Hearne*, 184 F.2d 76 (4th Cir. 1950); *State Insurance Fund* v. *Pesce*, 548 F.2d 1112 (2d Cir. 1977); *Puig* v. *Standard Dredging Corp.*, 599 F.2d 467 (1st Cir. 1979).

IV.

There Was Insufficient Factual Evidence Of The Illegitimate Child's Paternity, And Dependency At The Time Of The Longshoreman's Injury, To Support The Benefits Review Board's Award.

To recover benefits under the Act, an illegitimate child must prove paternity and dependency. Although the Act purports to require acknowledgement, the Supreme Court has held such a

requirement unconstitutional. *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972).

A. *The Administrative Law Judge properly questioned paternity of the child.* Judge Walley found insufficient evidence to prove paternity. He had heard evidence that the child's mother, Sheryl Wilfred, had sexual relations with John Henry Jones exclusively. He considered deposition testimony of John Henry Jones that Jones believed himself to be the father of a child.

He also considered the child's birth certificate, which indicated no father's name. He heard testimony from the mother and sister of John Henry Jones which questioned the paternity of the child.

The fact findings of the administrative law judge must stand, so long as they are supported by substantial evidence, are rational, and consistent with law. Judge Walley was free to consider the credibility of Sheryl Wilfred and possible bias or prejudice in her testimony. He simply did not believe her. *See*, 33 U.S.C. § 921(b)(3); *O'Keefe* v. *Smith, Hinchman & Gryllis Associates, Inc.*, 380 U.S. 359 (1965).

B. *There is controverted evidence as to dependency.* Judge Walley did not make any findings as to dependency, apparently because he did not reach the issue. Nevertheless, the Board ruled in favor of the child as a matter of law.

Dependency is a legitimate statutory prerequisite for Workers' Compensation benefits. *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. at 173-74. All questions of dependency under the Act must be based upon the time of *injury*. 33 U.S.C. § 909(f).

The child claimant, Johnetta Wilfred, was born post-injury. Nevertheless, she could recover upon a showing that, at the time of injury, her mother was dependent upon John Henry Jones. *Texas Employer's Insurance Association* v. *Shea*, 410 F.2d 56 (5th Cir. 1969). Yet there is *little* evidence of such dependency

at the time of injury: All evidence pertains to economic support *post-injury*. There is no evidence of financial support, continuous in nature, at the time of injury. *Texas Employer's Insurance Association* v. *Shea*, 410 F.2d at 62.

The evidence of the minor child's dependency is not "uncontroverted" as found by the Fifth Circuit.

The panel found that the minor child's mother was dependent at the time of injury. This was based upon testimony that the child's mother had been receiving payments in the form of money orders for $100 or so each.

The administrative law judge could easily discredit this testimony. His decision would have to be upheld so long as it were supported by substantial evidence, were rational, and consistent with law.

Yet, his finding could not only be supported by substantial evidence, it would also be quite rational, and would pend upon simple economic reality — disposable income. John Henry Jones averaged $200 a week for the year preceding his injury. From this, he would be expected to pay his income tax, longshore union dues, and his own support in the City of Galveston, where he lived. John Henry Jones also supported his mother in Brenham, paying her house note.

Frances Ray, sister to John Henry Jones, testified she knew nothing of any pre-injury support of Sheryl Wilfred, the child's mother.

The testimony of Florita Jacquet, maternal grandmother of the illegitimate child, testified that John Henry Jones sent money orders of $180 "every other week or every month" prior to his injury.

The administrative law judge could be totally justified in discounting this testimony of pre-injury support: John Henry Jones' average weekly wage just does not provide the arithmetic

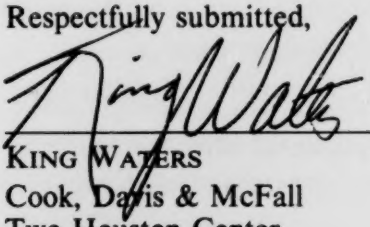
ability to provide for himself, his mother, and $180 monthly or bi-weekly to Ms. Wilfred.

The case should at least be remanded for further fact findings.

CONCLUSION

For these reasons, Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

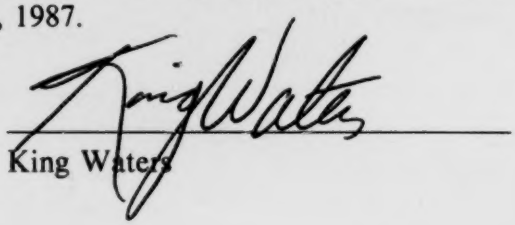


KING WATERS
Cook, Davis & McFall
Two Houston Center
909 Fannin, Suite 2600
Houston, Texas 77010-1003

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument have been served by certified mail, return receipt requested, upon each interested party, as appears below, on this 14th day of August, 1987.



King Waters

Mr. Theodore M. Haik, Jr.
Haik and Minvielle
P. O. Box 817
126 W. Washington
New Iberia, Louisiana 70561

Mr. Graham Hill
Hill, Parker, Franklin, Cardwell & Jones
5300 Memorial, Suite 700
Houston, Texas 77007

Office of the Solicitor
U.S. Dept. of Labor
Suite N-2620, NDOL
Washington, DC 20210

Solicitor General
Department of Justice
Washington, D.C. 20530

APPENDIX A

ST. JOHN STEVEDORING CO., INC.,
Employer, and Insurance Company of
North America, Carrier,

Petitioners,

v.

JOHNETTA WILFRED, ALENE C. JONES,
and Director, OWCP,

Respondents.

No. 86-4170.

United States Court of Appeals,

FIFTH CIRCUIT.

June 3, 1987.

POLITZ, Circuit Judge:

St. John Stevedoring Company, Inc. and Insurance Company of North America (INA) petition for review of a decision by the Benefits Review Board (BRB) awarding Longshore and Harbor Workers' Compensation Act (LHWCA, 33 U.S.C. §§ 901-950) death benefits to Alene C. Jones and Johnetta Rene Wilfred, mother and daughter, respectively, of John Henry Jones, the deceased worker. We deny review as relates to Johnetta Rene Wilfred but grant same as respects Alene C. Jones, finding that the benefits due her are subject to a credit, as discussed herein.

Background

On May 27, 1979, John Henry Jones sustained severe injuries during the course and scope of his employment by St. John Stevedoring. By December 23, 1981 he had received LHWCA compensation benefits from his employer totaling $291,839.71. On that date, he executed a compromise settlement agreement

with the parties against whom he had filed an *ex delicto* action. St. John Stevedoring and INA had intervened in Jones's tort suit, seeking recovery for compensation benefits.

The settlement agreement was executed by John Henry Jones, Alene C. Jones, the several tort defendants, St. John Stevedoring, and INA. The agreement provided for an immediate payment to John Henry Jones of $1,786,839.71, which included the sum due St. John Stevedoring and INA for past compensation benefits, plus $5,000 to Alene C. Jones, and, finally, $280,000 per year to John Henry Jones, for the balance of his life, providing that in the event he died before five annual payments were made, the remainder of those five payments would be made to Alene C. Jones, if she survived him, or to his estate, if she predeceased him. The agreement included a release of the tort-suit defendants and their insurers, a hold-harmless provision and, *inter alia,* the following:

> It is further understood and agreed that INA and St. John, in consideration for Said Sum and Future Payments, are to receive a credit therefor for accrual of all compensation benefits and medical expenses in the future.

The release recited that the sums paid and to be paid were received

> in full and complete satisfaction of any and all claims which [John Henry Jones & Alene C. Jones] have relating to said accident, injuries to and death of John Henry Jones, or damages claimed by said undersigned ... and that this release is intended to and does fully release all such claims.

A few months later, before the due date of the first annual payment, John Henry Jones died. Alene C. Jones and Sheryl Wilfred, on behalf of her minor daughter, Johnetta, initiated proceedings under 33 U.S.C. § 909, claiming LHWCA death benefits from St. John Stevedoring. In defense of the claims, St. John Stevedoring urged the settlement agreement and further contended that Johnetta was illegitimate and was not a child

within the meaning of the LHWCA. The matter was heard by an Administrative Law Judge who awarded benefits to Alene C. Jones but denied benefits to the child. On appeal, the BRB upheld the award to Alene C. Jones but reversed the ALJ and granted an award to the minor Johnetta. Both awards are now before us by virtue of the petition for review filed by St. John Stevedoring and INA.

ANALYSIS

Filiation and Dependency

A child entitled to LHWCA death benefits is defined to include an "acknowledged illegitimate child dependent upon the deceased," 33 U.S.C. § 902(14). St. John Stevedoring contends that resort must be had to the law of Louisiana, the state of Johnetta's domicile, to determine her filiation. The ALJ accepted their argument because as he noted, there is no body of federal family law.[1] The BRB disagreed with the ALJ's legal conclusion as to the applicable law. So do we.

---

[1] The ALJ relied on La.Civ.Code art. 209, which provides in pertinent part:

> B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgement under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.
>
> C. The proceeding required by this article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation, except for the sole purpose of establishing the right to recover damages under Article 2315. A proceeding for that purpose may be brought within one year of the death of the alleged parent and may be cumulated with the action to recover damages.

In *Texas Employers' Insurance Ass'n.* v. *Shea*, 410 F.2d 56 (5th Cir. 1969), we opined that "acknowledgment of paternity does not require a notary's seal or other ritualistic proclamation." *See also Weyerhaeuser Timber Co.* v. *Marshall*, 102 F.2d 78 (9th Cir. 1939). Application of rigorous state law schemes for proof of paternity, designed to serve various state interests such as the orderly devolution of property, especially immovable property, is inconsistent with the history and tradition of liberal administration of benefits under the LHWCA. *Voris* v. *Eikel*, 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5 (1953). While state law may prove helpful in that a child under state law would likely be a child under the LHWCA, the converse would not necessarily follow. As *Shea* and other cases indicate, because state law precludes a designation of paternity will not bar LHWCA benefits if a paternal link is proven. As we observed nearly a half-century ago, "in constructing the act [LHWCA] we are not bound by technical definitions but must interpret it by giving to the words used their ordinary meaning." *Maryland Casualty Co.* v. *Lawson,* 101 F.2d 732 (5th Cir. 1939).

Applying this common approach to the definitional process, the BRB readily concluded that "the evidence overwhelmingly supports a finding of acknowledgment." The record contains a sworn deposition by John Henry Jones and the sworn testimony of Sheryl Wilfred that Johnetta is their child. Johnetta is identified as a child in John Henry Jones's will and was listed as his child in the obituary prepared by his family. The only contra evidence is that his name does not appear as father on Johnetta's birth certificate. In light of this evidence, and its conclusion that the ALJ had applied the wrong legal standard, the BRB reversed his finding on filiation. We affirm the BRB on this issue.

St. John Stevedoring next argues that Johnetta was not dependent on her father for financial support at "the time of the injury." 33 U.S.C. § 909(f). On May 22, 1979 Johnetta had been conceived. She was born the following October.

A child *en ventre sa mere* is dependent on a LHWCA-covered worker if, at the time of the accident, the child's mother was dependent on that worker. *Texas Employers' Insurance Ass'n* v. *Shea*. In determining the dependency of the mother and child, the LHWCA does not require that the mother be supported entirely by the covered worker; partial dependency is sufficient. *Texas Employers' Insurance Ass'n.* v. *Sheppeard*, 62 F.2d 122 (5th Cir. 1932). Dependency may result if the injured party was "maintaining or helping to maintain the dependent in his customary standard of living." *United States* v. *Fidelity & Guaranty Co.* v. *Britton*, 188 F.2d 674 (D.C. Cir. 1951).

During the time Sheryl Wilfred carried Johnetta to term, she received regular financial aid from John Henry Jones. The uncontroverted testimony reflects that from the time Johnetta was *in utero*, and continuing to the date of his death, John Henry Jones sent Ms. Wilfred hundreds of dollars for their support, notably in regular payments. In addition, he bought the child clothing and gifts. Applying the test articulated in *Sheppeard, Standard Dredging Corp.* v. *Henderson*, 150 F.2d 78 (5th Cir. 1945), and similar cases, to the pertinent facts herein, we fully agree with the BRB's finding of dependency. Johnetta Rene Wilfred is an eligible child, entitled to death benefits under the LHWCA.

The Settlement

Petitioners did not contest the eligibility of Alene C. Jones but vigorously argued that her claim, as well as that of Johnetta, was foreclosed by the settlement agreement. Alternatively, they claimed a credit for the amount received in settlement.

The BRB rejected petitioners' arguments and concluded that the mother's claim was not barred by 33 U.S.C. § 933(g), which provides that if a "person entitled to compensation" compromises a third-party claim for less than the total compensation payable,

he must first secure the employer's permission to settle. The BRB concluded that Alene C. Jones was not a "person entitled to compensation" when she signed the settlement agreement. As to the credit or off-set petitioners claimed under 33 U.S.C. § 933(f), the BRB used the same reasoning. Alene C. Jones was not a "person entitled to compensation" at the time of the settlement.

We do not disagree necessarily with the reasoning of the BRB on this statutory interpretation, but we perceive a contractual basis for requiring a credit. In the settlement agreement which Alene C. Jones voluntarily signed, although she was not a party to her son's tort action, she received $5,000 in cash and the contractual right to any of the annual $280,000 payments falling due after the death of John Henry Jones and before December 1986. In return for the cash payment and contingent right, she waived and released all rights, including any wrongful death claims, against the tortfeasors. In addition she agreed that St. John Stevedoring and INA would "receive a credit therefor for accrual of all compensation benefits . . . in the future." In doing so, Alene C. Jones obligated herself to give the employer and compensation carrier credit for all sums she received as a result of the tort settlement agreement. And as the BRB observed, her recovery of the $5,000 at signing and the $1,400,000 in annual payments far exceeds the death benefits she could have received under the LHWCA. St. John Stevedoring and INA are entitled to a credit for the full amount of compensation benefits owed to the decedent's mother. *See Peters* v. *No. River Ins. Co. of Morristown, N.J.*, 764 F.2d 306 (5th Cir. 1985); *Bloomer* v. *Liberty Mutual Insurance Co.*, 445 U.S. 74, 100 S.Ct. 925, 63 L.Ed.2d 215 (1980).

That same reasoning does not apply to the minor child. Petitioners argue that because the decedent settled for his "heirs, executors, administrators, assigns, next of kin, or other legal representatives," the claim on behalf of the minor Johnetta is barred. The BRB did not so conclude, nor do we. John Henry

Jones did not have the power to settle or waive in advance any death benefits that might accrue to his minor daughter. The Act clearly contemplates that the rights of minors and those found mentally incompetent are to be protected. Section 911 envisions the appointment "by a court of competent jurisdiction" of a guardian for a minor, one who would then be empowered to act on behalf of the minor. Presumptively the law of Louisiana, Johnetta's domicile, would control. If not, the law of decedent's domicile, Texas, would. Under the laws of either state, court approval is required to compromise and settle a minor's claims. La. Code Civ. P. 4265; Rule 44, Tex. R. Civ. P. Nothing in this record reflects that such was done; indeed it is obvious that it was not done. The minor's rights, accordingly, are unaffected by the settlement agreement signed by her father.

Conclusion

We conclude that the BRB correctly found both Alene C. Jones and Johnetta Rene Wilfred eligible for LHWCA death benefits as a consequence of the death of John Henry Jones. In that regard, the petition for review is DENIED. However, we further conclude that St. John Stevedoring and INA are entitled to a credit against the compensation death benefits due Alene C. Jones for the sums she received by virtue of the settlement agreement she signed on December 23, 1981. That credit offsets in full her claim for benefits, and to that extent the petition for review is GRANTED.

Petition for review DENIED in part and GRANTED in part.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-4170

ST. JOHN STEVEDORING CO., INC.
AND INSURANCE COMPANY OF NORTH AMERICA,
Petitioners,

versus

JOHNETTA WILFRED, ALENE C. JONES
AND DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS,
Respondents.

Petitions for Review of an Order of the Benefits Review Board

ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion June 3, 1987, 5 Cir., 198.., ... F.2d.....)
(July 1, 1987)

Before GEE, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the

Court and a majority of the Circuit Judges who are in regular active service not having in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX B

BRB Nos. 85-316
& 85-316A

ALENE C. JONES
(Mother of JOHN HENRY JONES, deceased)
Claimant-Cross-Respondent

and

JOHNETTA WILFRED, Minor
Claimant-Petitioner

v.

ST. JOHN STEVEDORING COMPANY, INCORPORATED

and

INSURANCE COMPANY OF NORTH AMERICA
Employer/Carrier-Respondents Cross-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-interest

DECISION AND ORDER

Appeal of the Decision and Order of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

J. Graham Hill and John Roberson (Hill, Parker, Franklin, Cardwell & Jones), Houston, Texas, for claimant Jones.

Theodore M. Haik, Jr., New Iberia, Louisiana, for claimant Wilfred.

King Waters (Vinson & Elkins), Houston, Texas, for employer/carrier.

Karen Kimball (Francis X. Lilly, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Counsel for Benefit Programs), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, BROWN and McGranery, Administrative Appeals Judges.

PER CURIAM:

Sheryl Wilfred on behalf of her minor daughter Johnetta Wilfred appeals, and St. John Stevedoring Company (employer) cross-appeals, the Decision and Order (83-LHC-1698) of Administrative Law Judge Ben H. Walley awarding benefits to Alene C. Jones, mother of the deceased employee John Henry Jones and denying benefits to claimant Wilfred, on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et. seq.* (the Act).

The parties have stipulated that John Henry Jones sustained an injury on May 27, 1979, in the course and scope of his employment with St. John Stevedoring Company. Prior to his death in December 1981, decedent and his mother, Mrs. Alene Jones, jointly filed and settled a third-party action for the work related injuries. A final judgment was entered in that case for over $3.5 million in cash and annuities.[1] The decedent died on June 8, 1982, from a myocardial infarction.

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[1] The settlement provided for $1,786,839.71 in cash to the employee and $5,000 to Alene Jones, in addition to yearly payments of $280,000 to the employee commencing December 1982. In the event of the employee's death before December 1986, the annual payments were to continue through that date and be made to Alene Jones, if living, or to the estate of the employee in case of Alene Jones' death.

On behalf of her minor daughter, Sheryl Wilfred appeals a denial of death benefits, asserting her daughter's entitlement as the illegitimate daughter of deceased employee, John Henry Jones. Based on the provisions of the Louisiana Civil Code, the administrative law judge concluded that a preponderance of the evidence failed to establish the deceased employee's paternity and therefore awarded all death benefits to Mrs. Alene Jones, as mother and sole eligible dependent of the decedent. 33 U.S.C. § 902(15); 33 U.S.C. § 909. On appeal, the Director and claimant Wilfred contend that the administrative law judge erred in relying on Louisiana law and that Johnetta Wilfred is entitled to death benefits as the acknowledged and dependent illegitimate daughter of decedent under 33 U.S.C. § 902(14).

Employer cross-appeals alleging that Mrs. Jones' participation in the settlement of her injured son's third-party action prior to his death bars further compensation under 33 U.S.C. § 933(g). Alternatively, employer argues that it is entitled to an offset under 33 U.S.C. § 933(f) and therefore does not owe death benefits until the net proceeds of the settlement are exhausted.

Oral argument was heard on September 11, 1985, in Houston, Texas, at which time the Board denied claimant Wilfred's Motion to Strike and accepted employer's Response Brief.

The Board's scope of review is limited. If the findings of fact are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3); *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement under the Act, an illegitimate child must be both acknowledged and dependent upon the deceased. 33 U.S.C. § 902(14). Relying on *Ryan-Walsh Stevedoring Co., Inc.* v. *Trainer*, 601 F.2d 1305 (5th Cir. 1979), the administrative law judge determined that since the Act does not define the term "acknowledged illegitimate child," the state law

of Louisiana, the child's domicile, must apply the meaning of "acknowledged." Based on articles of the Louisiana Code which require either a formal declaration of paternity by the father or mother before two witnesses and a notary public, or a determination of filiation in a civil proceeding instituted by the child within certain time limits, the administrative law judge found that the record evidence failed to meet these requirements.

We agree with the Director and claimant that the administrative law judge erred in applying Louisiana law. As the Board recently held in *Bonds* v. *Smith & Kelly Co.*, ... BRBS ..... BRB No. 81-2519 (August 13, 1985), recourse to state law to define terms not defined in the Act is appropriate only when the term does not have a clear, common meaning and it cannot be easily defined. In *Bonds*, the Board held that the term "dependency" in Section 2(14) should be defined by reference to its common meaning rather than state law. The term "acknowledged," like "dependent," can be given a clear meaning and there is no reason to turn to restrictive state codes to define this term. A factual determination of whether an illegitimate child is "acknowledged" should be made based on its plain common meaning and relevant federal case law based on the record evidence. *See Texas Employer Insurance Association* v. *Shea*, 410 F.2d 56 (5th Cir. 1969) (Under Section 2(14) of the Act, " ... acknowledgment of paternity does not require a notary's seal or any other ritualistic proclamation ...").

In the instant case, the evidence overwhelmingly supports a finding of acknowledgement. The evidence regarding acknowledgement includes the sworn deposition of decedent dated June 30, 1981, wherein decedent publicly acknowledged the illegitimate child as his.[2] The record also contains decedent's Last Will

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[2] Employer contends that decedent's deposition in the third-party claim was inadmissable at the formal hearing under the Federal Rules of Evidence. Although employer attended the deposition, it contends it

and Testament in which he lists claimant Wilfred as a potential beneficiary along with decedent's brothers and sisters, and a memorial service sheet and obituary prepared by decedent's sister which refers to decedent's paternity. Additionally, the record includes the testimony of the mother, Sheryl Wilfred, at the formal hearing acknowledging the decedent as the father of her child, and testifying as to the time and place of conception. There is nothing in the record to suggest that claimant is not decedent's daughter. Since the evidence is clear, uncontradicted, and allows no other possible result, we find claimant Wilfred acknowledged under Section 2(14) as a matter of law.[3]

With regard to the question of dependency, Sheryl Wilfred testified that she depended on her mother and decedent for her support and that decedent would give money on a regular basis. Similar testimony was provided by decedent's sister, Frances Ray, and the witness Flo ita Jacquet. As claimant correctly argues,

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had no motive to develop testimony adverse to this claim at that time. We reject this contention since administrative law judges are not bound by the formal rules of evidence, 33 U.S.C. § 923(a), 20 C.F.R. § 702.339, *Darnell* v. *Bell Helicopter International Inc.*, 16 BRBS 98 (1984). Additionally, employer had ample opportunity to protect its interest by developing evidence in the proceedings below.

[3] We additionally note that our disposition of this case would appear to be the same even under an application of Louisiana law. Article 203 of the Louisiana Civil Code provides one method of establishing filiation of an illegitimate child:

> The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and mother or either of them, or it may be made in the registering of the birth or baptism of the such child.

La. C.C. Art. 203. Decedent's deposition testimony was taken by a certified shorthand reporter and notary public before four witnesses. It would appear that his testimony suffices as a declaration publicly acknowledging the illegitimate child in the instant case for purposes of Article 203.

however, the administrative law judge failed to make a factual inquiry as to dependency because he found the acknowledgment issue dispositive. The uncontradicted testimony of all the witnesses nevertheless establishes that the child's mother relied on regular contributions of substantial sums of money from decedent. Accordingly, we reverse the adminstrative law judge's finding that claimant Wilfred is not decedent's "child" under Section 2(14) and hold that she has established acknowledgement and dependency as a matter of law. Claimant Wilfred is therefore entitled to benefits under the Act equal to 50 percent of decedent's average weekly wage plus adjustments pursuant to 33 U.S.C. § 910(f).

Regarding claimant Alene C. Jones, employer raises two issues in its cross-appeal. First, employer contends that Mrs. Jones' participation in the settlement of the third-party action bars death benefits under Section 33(g), 33 U.S.C.A. § 933(g) (West Supp. 1985), since no written approval was timely filed.[4] Second,

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[4] Section 33(g), as amended in 1984 provides:

> "(g)(1) if the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> "(2) if no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether

employer contends that it is entitled to offset under Section 33(f) and therefore does not owe death benefits to claimant until the net proceeds of the settlement are exhausted.

We hold that Section 33(g) is not applicable in the instant case. Due to the size of Mrs. Jones' portion of the settlement ($5,000 in cash and $280,000 per year annuity from December 1982, through December 1986), it would be impossible for the death benefits to *exceed* the settlement amount.[5]

Section 33(g) explicitly requires that the settlement be for an amount *less* than employer's liability for benefits. Since recovery beyond the settlement is impossible, Section 33(g) is not in controversy. Additionally, the written approval requirement of Section 33(g)(1) is inapplicable because the employee was not yet dead at time of the settlement and Mrs. Jones was thus not receiving death benefits from employer at the time of settlement. She was therefore not "entitled to compensation" within the meaning of Section 33(g)(1). *See generally Dorsey v. Cooper Stevedoring Co., Inc.*, ... BRBS ...., BRB No. 82-827 (Jan. 27, 1985). It would be absurd to require the mother to obtain Section 33(g)(1) approval so as to retain her right to death benefits where the employee is not dead.

Finally, regarding the offset issue, Section 33(f) provides that:

> If the person *entitled to compensation* institutes proceedings within the period prescribed in section 33(b), the employer

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the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

33 U.S.C.A. § 933(g)(West Supp. 1985).

[5] Section 9(d) provides for payment of 25 percent of the average weekly wage for a parent. Since we hold that the child also prevails, this would diminish to 126.6 percent of the average weekly wage. *See* 33 U.S.C. § 909(c), (d). The average weekly wage in this case is $200. This results in a compensation rate of no more than a few thousand dollars a year.

> shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C.A. § 933(f) (West Supp. 1985) (emphasis added). As the administrative law judge did not consider this issue, he did not provide for an offset.

In the instant case, the settlement was entered into prior to death and presumably compensated the employee and mother for loss due to the employee's disability, rather than loss due to his death. Thus, the lifetime settlement does not overlap with death benefits under Section 9. This factor is especially significant since, as discussed above, claimant was not a "person entitled to compensation" prior to decedent's death. We therefore hold that employer is not entitled to offset against the mother's third-party settlement under Section 33(f).

Accordingly, the administrative law judge's denial of benefits to claimant Wilfred is reversed. The award is modified to provide for recalculation of compensation benefits for claimants Jones and Wilfred under Section 9 consistent with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

ROBERT L. RAMSEY
Chief Administrative
Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

Dated this 31st day of January 1986.

APPENDIX C

In the matter of JOHN HENRY JONES (DECEASED) MRS. A. C. JONES (MOTHER), ET AL *Claimants* against ST. JOHN STEVEDORING CO., INC. *Employer* INSURANCE COMPANY OF NORTH AMERICA *Carrier*	Case No. 83-LHC-1698 OWCP No. 8-53831

J. Graham Hill, Esquire
For the Claimant, Mrs. A. C. Jones

Ted Haik, Jr., Esquire and Richard I. Haik, Esquire
For the Claimant, Johnetta Wilfred

King Waters, Esquire
for the Employer/Carrier

Before: BEN H. WALLEY
Administrative Law Judge

DECISION AND ORDER

This is a claim for death benefits under the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C., Section 901, *et. seq.* (hereinafter referred to as either LHWCA or the Act), which claim is based on the death of John H. Jones deceased (hereinafter referred to as the decedent), filed by his mother Mrs. Alene C. Jones; Sheryl Wilfred filed a separate claim on behalf of Johnetta Wilfred, decedent's alleged daughter. Prior to his death, the decedent filed a claim for compensation as a result of an injury which occurred on May 17, 1979, while in the course and scope of his employment with St. John Stevedoring

Co., Inc. (hereinafter referred to as the Employer), with a hearing held on December 15, 1982. The Employer is insured by Insurance Company of North America (hereinafter referred to as the Carrier).

An issue arose of the eligibility and dependency of the claiming mother and alleged minor daughter that could not be resolved administratively and the cause was referred to this office for a formal hearing. A hearing in this matter was held before an Administrative Law Judge on November 28, 1983, in Houston, Texas. The individual parties and their diverse interests are identified as follows:

1. Mrs. Alene C. Jones, Claimant, mother of the decedent, and her attorney;

2. Sheryl Wilfred, on behalf of her minor daughter, Johnetta Wilfred, claimant, and her attorneys;

3. St. John Stevedoring Co., Inc., and Insurance Company of North America, and their attorney, and a company representative of the insurance company.

Preliminary Matter

Counsel for Respondents has objected to the admissibility of certain evidentiary documents. At the formal hearing, counsel for Claimant Johnetta Wilfred offered into evidence a deposition taken of the decedent pertaining to a third party claim which he had filed. Both at formal hearing and subsequently in a brief submitted to this Court, counsel for Respondents objected to the introduction of any of decedent's deposition testimony rendered in connection with the third party claim. Under the provisions of 5 U.S.C. 554 and the regulations issued thereunder, I conclude that the deposition testimony of decedent, John H. Jones, is relevant and material to the matter at issue and is therefore received into evidence. 20 C.F.R. §702.338.

Findings of Fact and Conclusions of Law

At the outset of the hearing, inquiry was made of the parties and they responded by announcing agreement on certain material facts and dictated them into the record, which are as follows:

Stipulations

1. The named employee is John Henry Jones;

2. The date of injury was May 27, 1979;

3. The injury to decedent occurred in the course and scope of his employment with St. John Stevedoring Co., Inc.;

4. The decedent's employer was St. John Stevedoring Co., Inc.

5. The employer had statutory notice of the injury;

6. At the time of injury, John H. Jones' average weekly wage was $200.00;

7. The LHWCA applies to this proceeding;

8. The decedent died on June 8, 1982, and that on the date of his injury and on the date of his death, Mrs. A. C. Jones, decedent's mother, was economically dependent on him;

9. Mrs. A. C. Jones was the natural mother of John H. Jones;

10. Prior to the death of John H. Jones, a third party action was filed and settled. A release and settlement agreement was executed, and a final judgment was entered in that case;

11. A funeral bill in excess of $1,000 in reasonable and necessary funeral expenses was incurred, and the funeral expenses were paid out of the estate of the decedent;

12. All compensation benefits until the time of John H. Jones' death had been paid according to law. The employer was fully reimbursed as a result of the third party settlement.

The parties all agreed to the foregoing stipulations and I accept them as facts in this case. Since it has been stipulated that Mrs. A. C. Jones, Claimant, was economically dependent on the decedent, i.e. Claimant Mrs. Jones looked to and relied upon the contributions of the decedent/employee in whole or in part as a means of maintaining and supporting herself in accordance with the accustomed mode of life, I find Claimant, Mrs. Jones, entitled to an award of death benefits under the provisions of the Act. (33 U.S.C. § 902(15)).

Issue

Based on the foregoing facts of record, stipulations, and the evidence presented by the parties, both testimony and depositions of witnesses and their documentary evidence and exhibits, I find and conclude that the singular issue before me is whether Johnetta Wilfred, Claimant herein, was a legal dependent, and is therefore eligible for death benefits under Section 9 of the Act (33 U.S.C. § 909).

In order to establish entitlement to benefits, it is necessary to determine whether the Claimant Johnetta Wilfred qualifies as a "child" as defined by Section 902(14) of the LHWCA as follows:

> "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild,"

"brother," and "sister" include only persons who at the time of death of the deceased employee are under eighteen years of age. 33 U.S.C. § 902(14).

The definition of the term "child" includes an "acknowledge[d] illegitimate child dependent on the deceased. . . ." *Ingalls Shipbuilding Corporation v. Neuman,* 448 F.2d 773 (5th Cir. 1971), aff'g, 322 F. Supp. 1229 (S.D. Miss. 1970). Since the LHWCA does not define the term "acknowledged illegitimate child," the applicable state law of persons must supply its meaning. See *Ryan-Walsh Stevedoring Company, Inc. v. Trainer,* 601 F. 2d 1306, 10 BRBS 852 (5th Cir. 1979).

After determining which state law governs, it can then be decided whether Johnetta Wilfred is an "acknowledged illegitimate child" and thus falls within the purview of the Act's coverage.

The Proper Local Forum

To determine whether a Claimant is decedent's "child," state law is dispositive because the LHWCA does not define this operative term. *Ellis v. Henderson,* 204 F. 2d 173 (5th Cir.), cert. denied, 346 U.S. 873 (1953). The facts of record identifying events in two states, Texas and Louisiana, indicate that either may be the proper jurisdictional forum for resolving the issue in the instant case.

Because there is no federal law of persons, the law of Louisiana which is the state of the child's domicile, should be applied to determine the status of Johnetta Wilfred under the Act. *Texas Employers Insurance Association v. Shea,* 410 F.2d 56 (5th Cir. 1969); *Murphy v. Houma Well Service,* 409 F. 2d 804 (5th Cir. 1969).

Therefore, based on the foregoing, I find and conclude that the proper forum to determine the issue before me of the legal status

of Claimant Johnetta Wilfred is Louisiana. See La. C. Civ. P. Art 10 A(8); cf. *Daily v. Hough,* 368 So. 2d 1182 (La. App. Cir. 1979), writ denied, 369 So. 2d 1378.

Having concluded that the facts of this case must be measured according to the Louisiana Civil Code, what is the legal status of the Claimant, Johnetta Wilfred, in order to qualify for LHWCA death benefits?

Legal Status of Johnetta Wilfred

The evidence of record indicates that the decedent and Sheryl Wilfred, mother of Claimant Johnetta Wilfred, maintained a relationship from April 1978 until December 1978. Ms. Wilfred testified at the hearing that during that time she occasionally had sexual intercourse with decedent when they visited either in Texas or Louisiana. Ms. Wilfred further testified that the child, Johnetta Wilfred, was conceived in Louisiana in December 1978. Ms. Wilfred stated she continued to see John H. Jones until the date of his injury in Texas in May 1979. Johnetta Wilfred was born on October 4, 1979 in Louisiana.

Testimony rendered at the hearing by witnesses for both Claimants established that Ms. Wilfred received money orders from John H. Jones sent periodically from Texas to Louisiana both before and after Johnetta Wilfred was born. The amount of the money orders varies from $80.00 to $100.00, as did the times the money orders were sent, from two weeks to several months apart.

John H. Jones died in Texas in June 1982. His will was probated in Texas Civil Court.

Under the laws of Louisiana, authority for the acknowledged illegitimate child doctrine is derived from the Louisiana Civil Code. There exist two methods of establishing the paternity of an

illegitimate child. Article 203 of the Louisiana Civil Code provides:

> The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the present of two witnesses, by the father and mother or either of them, or it may be made in the registering of the birth or baptism of such child.

Article 208 of the Code states the requirements for proving filiation (paternity) of an illegitimate child:

> A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.
>
> B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgement under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.
>
> C. The proceeding required by this Article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation.
>
> D. The right to bring this proceeding is heritable.

In *In re Martin,* 347 So. 2d 893 (La. App. 1st Cir. 1978), a Louisiana appellate court explained the burden of proof and sufficiency of the evidence required to constitute an acknowledgement under La. C.C. Art. 203.

According to the facts set forth in *Martin,* supra, the alleged father's name was listed on the birth certificate with no objection

on his part; the claimed natural parents were living together at the time of the illegitimate child's birth; and the alleged natural father admitted that the child was his. After the appellate court examined La. C.C. Art. 203 and the applicable caselaw, the court concluded that the facts presented were not sufficient to constitute an acknowledgement under La. C.C. Art. 203. The appellate court found that although the alleged natural father's name appeared on the birth certificate, it was established that someone other than the alleged father had placed the name in the birth records of the child. Furthermore, there is no contention that he signed it. The court also considered the admission and failure to protest by the alleged father. However, the court found these circumstances to be insufficient to meet the standard. The court reasoned: "[T] he code speaks in terms of acknowledgement being made in the 'registering of the birth.' * * * * See *Allen v. Anderson,* 55 So. 2d 596 (Orl. La. App. 1951)."

In a related case, *Boudreaux v. Matt,* 370 So. 2d 139 (La. App. 3rd Cir. 1979), that Louisiana appellate court discussed the legal consequences of evidence presented to establish acknowledgement. The court held that the plaintiff therein failed to establish that it was more probable than not that the alleged natural father was responsible for the child's conception, i.e. the burden of proof ordinarily required to establish an issue of fact. The court concluded that the evidence in that case failed to prove that the child was actually the illegitimate child of the alleged father or that plaintiff established paternity for the purposes of a claim for any of the rights given by law regarding parent and child.

This same Louisiana appellate court, the Third Circuit, considered the burden of proof required for a paternity action in *Fontenot v. Thierry*, 422 So. 2d 586 (La. App. 3rd Cir. 1982), writ denied, 427 So. 2d 868 (La. 1983). The court outlined the sufficient basis required to determine the paternity claim, i.e. by a preponderance of the evidence. Other appellate courts in Louisiana have interpreted this evidentiary standard strictly, placing it

as an ultimate issue of fact unless it is established with reasonable certainty that all other alternatives are impossible. *IMC Exploration Company and The Petroleum Corporation of America v. Foster Henderson*, 419 So. 2d 490 (La. App. 2d Cir. 1982), writ denied, 423 So. 2d 1149 (LA 1982), reconsideration denied, 427 So. 2d 866 (La. 1983).

The evidence presented by the parties at the hearing failed to establish by a preponderance of the evidence the paternity of Johnetta Wilfred. The deposition of decedent admitted into evidence contained information that he believed himself to be the natural father of Johnetta Wilfred. However, this does not qualify as a declaration of acknowledgment under the provisions of La. C.C. Art 203. Furthermore, the terms of decedent's will, also admitted into evidence, do not contain any provisions which would serve to recognize Johnetta Wilfred as his acknowledged illegitimate daughter. Finally, no records were introduced into evidence before this Court which demonstrated that a timely civil proceeding had ever been instituted which established the child's filiation according to the terms of La. C.C. Art. 208.

Based upon the standard set forth according to the provisions of the Louisiana Civil Code, it is my conclusion that there has been no substantial proof of paternity in the instant case; it has not been definitively established that the decedent was the natural father of Johnetta Wilfred.

Therefore, all death benefits should be paid to the eligible dependent Mrs. A. C. Jones, mother of the decedent, and said benefits should be paid to her in the amount and for the full time of her eligibility to receive said benefits according to the terms and provisions of the Act.

ORDER

IT IS THEREFORE ORDERED:

1. That the claim of Johnetta Wilfred, brought on her behalf by her natural mother, be and it is hereby DENIED; and

2. The Employer/Carrier shall pay unto Mrs. A. C. Jones, decedent's mother, the death benefits as provided by Section 9 of the Act, in the amount and for the time of her respective eligibility as provided by the Act (33 U.S.C. Section 901, et seq.); based on an average weekly wage of $200.00;

3. The Employer/Carrier shall pay to Claimant Mrs. A. C. Jones interest computed in accordance with 28 U.S.C. §1961 on each past due installment of death benefits until paid, to be computed by the Deputy Commissioner;

4. The Employer/Carrier shall pay the estate of John H. Jones $1,000.00 for reasonable funeral expenses pursuant to Section 9(2) of the Act; and

5. Claimant's attorney, within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel who shall then have 10 days to respond with objections thereto.

BEN H. WALLEY
Administrative Law Judge

Dated: December 18, 1984
New Orleans, Louisiana